

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Yolo)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNEST LANE MORALES,

Defendant and Appellant.

C090132

(Super. Ct. No. CRF161056)

Defendant Ernest Lane Morales was found guilty of arson of an inhabited structure. The trial court sentenced him to an aggregate term of 23 years, which included several prior conviction and prior prison term enhancements. The court also imposed a restitution fine, criminal conviction assessment, and court security assessment. Defendant originally appealed his conviction on several grounds, and we remanded for resentencing for the trial court to consider its discretion to strike a prior serious felony conviction under Senate Bill No. 1393. On remand, the court decided to not dismiss the

enhancement. On appeal, defendant contends: (1) the prior prison term enhancements must be stricken under a separate bill, Senate Bill No. 136; and (2) pursuant to the holding in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), the imposition of the restitution fine and court assessments violates his constitutional rights because there was no determination of his ability to pay. Agreeing with his first contention, we will strike the two enhancements and affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

We omit the facts of defendant's crimes as they are unnecessary to resolve this appeal. A jury found defendant guilty of arson of an inhabited structure. At a bifurcated court trial on enhancements, the court found true two prior strikes, a prior serious felony conviction, and two prior prison term allegations -- one for felony in possession of a firearm and one for theft and embezzlement of an elder. At sentencing, in April 2017, the court dismissed one strike and sentenced defendant to 23 years, comprised of eight years for the arson, doubled to 16 for the strike, five years for the prior serious felony, and one year for each of the prior prison terms. The court also ordered a \$30 criminal conviction assessment, a \$40 court operations assessment, and a \$300 restitution fine.

Defendant appealed his conviction on several grounds; we affirmed the judgment. (*People v. Morales* (Sept. 5, 2018, C084560) [nonpub. opn.].) The Supreme Court remanded for us to consider the effect of newly passed Senate Bill No. 1393. On remand, we concluded Senate Bill No. 1393 applied retroactively and "remanded for resentencing to allow the trial court to consider whether the enhancements under Penal Code section 667, subdivision (a)(1) should be stricken pursuant to Senate Bill No. 1393." (*People v. Morales* (Jan. 22, 2019, C084560) [nonpub. opn.].)

Defendant filed a motion with the trial court to dismiss the serious felony conviction pursuant to Senate Bill No. 1393. In July 2019, the trial court held a hearing on defendant's motion and chose not to exercise its discretion to strike the enhancement, denying defendant's motion.

## DISCUSSION

### *Prior Prison Term Enhancements*

#### I

Defendant first contends, and the People agree, that recently enacted Senate Bill No. 136, which limits the prior offenses qualifying for a prior prison term enhancement, applies retroactively to this case. We agree.

Signed by the Governor on October 8, 2019, and effective January 1, 2020, Senate Bill No. 136 amends Penal Code section 667.5, subdivision (b), to eliminate the one-year prior prison term enhancement for most prior convictions. (Stats. 2019, ch. 590, § 1.) An exception, not applicable here, is made for a qualifying prior conviction on a sexually violent offense, as defined in Welfare and Institutions Code section 6600, subdivision (b).

Because Senate Bill No. 136 is now effective and defendant's judgment is not yet final, the amended law will apply to him retroactively. (See *In re Estrada* (1965) 63 Cal.2d 740, 744-745 [absent evidence of contrary legislative intent, ameliorative criminal statutes apply to all cases not final when statute takes effect].) Accordingly, defendant's Penal Code section 667.5, subdivision (b) enhancements must be stricken.

#### II

### *Restitution Fine And Court Assessments*

Defendant next challenges the trial court's imposition of the court facilities assessment, court operations assessment, and restitution fine. Relying on *Dueñas, supra*, 30 Cal.App.5th at page 1157, he argues the trial court failed to hold an ability-to-pay hearing, violating his constitutional rights. He also claims ineffective assistance of counsel if this issue was forfeited. The People argue forfeiture because *Dueñas* was decided seven months before resentencing.

Defendant forfeited his challenge to the fines, fees and assessment because the resentencing hearing was held after *Dueñas* was decided; there was thus authority for requesting an ability-to-pay hearing at the time of the resentencing hearing and defendant failed to do so. (Cf. *People v. Castellano* (2019) 33 Cal.App.5th 485, 489.)

To establish ineffective assistance of counsel, “the defendant must first show counsel’s performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) On direct appeal, a judgment will be reversed for ineffective assistance “only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding.” (*Ibid.*)

Defendant points to nothing in the record as to why defense counsel failed to object to the imposition of the fines, fees, and assessment; and, the record does not affirmatively disclose that counsel had no tactical purpose for doing so. Perhaps counsel had a reason to conclude defendant could pay the \$370 in fines and fees. Defendant’s prejudice analysis moreover does not show a reasonable probability that the outcome would have been different had his counsel objected. Defendant relies on being “represented by appointed counsel” and his assertion “he has been unable to work since 2005,” but notes he had been receiving \$1,500 per month in disability benefits during that time. This does not meet defendant’s burden of showing resulting prejudice.

#### DISPOSITION

The judgment is modified to strike the two enhancements imposed under Penal Code section 667.5, subdivision (b). The trial court is directed to amend the abstract of

judgment to reflect this change and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects we affirm.

/s/  
Robie, J.

We concur:

/s/  
Raye, P. J.

/s/  
Mauro, J.